LIM CHEEN HOONG & ANOR.

v.

INTIME SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C276 OF 1982]
5 APRIL 1985

CIVIL PROCEDURE: *Order 14 application - Judgment in default - Cheques dishonoured - Application to set aside default judgment - Whether there was a defence on the merits.*

This is an application by the defendant for an order of the Court to set aside judgment in default entered against the defendant by the Senior Assistant Registrar. Two cheques which amounted to RM1,000,000 were tendered by the defendant and drawn by the plaintiffs upon the defendant at Malayan Banking Berhad, Temerloh. When these two cheques were presented for payment, they were dishonoured.

Held:

[1] The judgment in default was not irregular as it was the fault of the defendant's solicitor that he did not stay at the Court until his case came up for hearing.

[2] After considering the evidence on the affidavit to decide whether there was an affidavit of merits, the Judge held that there was consideration for the two cheques. There was also an explicit admission by the defendant company that it was owing the plaintiffs a sum of RM500,000.

[3] Although the evidence regarding the date of the cheques was conflicting, it was found from the letter dated 27 October 1978 that the cheques were given by the defendant.

[4] As there was no defence on the merits the application should be dismissed with costs.

[Application dismissed with costs.]

Case referred to:

Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23

For the applicant/defendant - Abdul Kadir Kassim (Yap with him); M/s. Kadir, Tan & Ramli
For the plaintiffs/respondent - C.H. Liew; M/s. C.H. Liew & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the defendant for an order of the Court to set aside judgment in default entered against the defendant by the Senior Assistant Registrar.

The plaintiffs' claim against the defendant is for a sum of RM1,000,000. In their statement of claim they averred that the defendant tendered two cheques for RM500,000 each dated 30 October 1981, drawn by the plaintiffs upon the defendant against the Malayan Banking Berhad, Temerloh. The two cheques were presented for payment on or about 29 December 1981, and were dishonoured. The defendant was duly informed of the dishonour by a letter dated 18 January 1982.

In considering this application, I am bound by the test laid down by the Federal Court in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23. In that case Raja Azlan Shah Ag. CJ (Malaya), as he then was, in delivering the judgment of the Court said:

> The rule gives the Court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

Encik Kadir Kassim, Counsel for the applicant, in his submission did not touch on the regularity of the judgment. I take it that he was not pursuing that point. In any case, I find that the judgment is regular. The defendant had filed its defence before the hearing of the plaintiffs' application for summary judgment. At the hearing of the O. 14 application on 21 June 1984, neither the defendant nor the defendant's solicitor was presents. The Senior Assistant Registrar accordingly entered a default judgment. In his affidavit dated 27 October 1984 (Encl. 11), the solicitor for the defendant averred that on the date of the hearing of the O. 14 application, he waited at the High Court Registry until 12.30 p.m. but the case was still not called up. He left the Court for a lunch break. He stated that after lunch break he stayed in the office "for sometime due to some urgent office matter."

He arrived at the Court Registry at 2.50 p.m. and learnt that the Senior Assistant Register entered judgment in default against the defendant. I think the solicitor is entirely to be blamed.

The next question to be considered is whether there is an affidavit of merits. The affidavit in support of the present application (Encl. 17) was sworn by the Managing Director of the defendant company on 27 October 1984. In the affidavit he denied that the two cheques were legally tendered. He then referred to paras. 4, 5 and 6 of his earlier affidavit dated 30 June 1982 (Encl. 6). The three paragraphs state as follows:

> 4. It was agreed between the plaintiffs and the defendant company that the said property would be transferred into the defendant company's name for the purpose of obtaining a loan from the defendant company's bankers to meet the balance of the purchase price which the plaintiffs had to pay to the said original vendors and further that thereafter the development of the said property although to be carried out jointly would be carried out under the name of the defendant company. It was also agreed that since the plaintiffs were familiar with the area where the said property were situate, the plaintiffs would guarantee the sale of the houses to be developed on the said property.
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> 5. In accordance with this the defendant company would share with the plaintiffs the benefits of the development of the said property the defendant company would pay the plaintiffs from the proceeds of the sale of all the houses to be developed thereon, a proportion thereof of the moneys received up to the limit in the aggregate of RM$500,000 and further would transfer to the plaintiffs four (4) bungalow units without payment from them, duly constructed in accordance with the plans to be submitted by the defendant company.
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> 6. For the purpose of securing the necessary loan to help meet the balance of the purchase price to the original vendors of the said property and to carry out the preliminary development works on the said property, it was agreed between the plaintiffs and the defendant company that the purchase price of the said property be RM$2,500,000 and further that the plaintiffs would acknowledge having received

from the defendant company the sum of RM$1,000,000 it was for the purpose of verifying to the bank providing the loan as aforesaid that the sum of RM$1,000,000 had been duly received by the plaintiffs from the defendant company that the two cheques which form the subject matter of this suit were issued to the plaintiffs. As the parties were not sure when the said cheques would be shown to the bank as proof of payment, it was also agreed that the said cheques be left undated. The defendant company in accordance with this arrangement duly handed the said cheques to the plaintiffs.

The defendant company denied that it ever requested the plaintiffs to refrain from presenting the cheques. The defendant exhibited in Encl. 17 a letter dated 10 June 1983, written by the defendant's solicitors to the plaintiffs' solicitors. According to the defendant, an undertaking was reached between both parties that "the defendant's company would be entitled to deduct from the RM500,000 which the defendant had agreed to pay to the plaintiffs, the money which the defendant had themselves collected from purchasers."

Encik Kadir submitted that there was an affidavit of merits. He said that there was a triable issue in this case and contended that there was no consideration in respect of the two cheques. Miss Liew submitted that there was consideration in this case. I agree with her. In para. 5 of Encl. 6 quoted above, the defendant stated that there was a joint scheme between the plaintiffs and the defendant. Under the scheme, the plaintiffs would get a proportion of the sale for the development of the said property up to RM500,000 and four units of bungalow houses. This averment is interrelated to the two cheques in question.

Apart from the fact that there was consideration, there was an explicit admission by the defendant company that it was owing the plaintiffs a sum of RM500,000 The defendant also promised to construct the four units of bungalow houses for the plaintiffs. This is clearly stated in the letter written by the defendant's solicitors dated 10 June 1983. The letter reads:

> Re: Kuala Lumpur High Court
> C.S. No. C276/82
> Lim Cheen Hoong & Te Ah Sang
> v. Intime Sdn. Bhd.
>
> We refer you to the above matter and wish to inform you that following discussions with your clients the following points have been agreed upon:
>
> (i) that our clients will pay your clients a monthly instalment of RM20,000 until the whole of the sum of RM500,000 less the sum advanced to your clients and further less the moneys collected by your clients from purchases units of houses which have been acknowledged by our clients. The statement relating to this was handed to you personally.
>
> (ii) that our clients will set off from the sum due to your clients stated above, the sum due from one of your clients to our clients under a construction agreement made earlier.
>
> (iii) that our clients will construct the 4 units of bungalow houses, the said units to be completed within 24 months -from now. The transfers of title in favour of your clients or their nominees in respect thereof will be executed upon completion of construction of the said 4 units.
>
> (iv) that your clients lift the existing caveats on the said land to facilitate the carrying out and completion of the said project by our clients.
>
> (v) that your clients withdraw the suit currently pending in the High Court, Kuala Lumpur.
>
> (vi) that each party bear its own costs.

Kindly respond to this urgently. We can reduce the above into an agreement if you seen such agreement necessary.

Encik Kadir went at length in his submission on the discrepancies in the dates of the cheques. According to him there was no evidence that the cheques were post-dated. He referred to a letter dated 27 October 1980, as exhibited in Encl. (6). According to Encik Kadir, if the cheques were delivered on that date and if it was presented to the bank more than six months after the cheques were delivered, then it would be a stale cheque. Miss Liew of the other hand, said the cheques were post-dated and in the affidavit in support of the O. 14 application (Encl. 3), Mr. Lim Cheen Hoong stated that the two cheques were tendered on 30 October 1981. The evidence regarding the date of the cheques is conflicting. But what the Court has to consider is who gave the cheques? It is clear to me that from the letter dated 27 October 1978, the cheques were given by the defendant.

I find there is no merit in the defence and I accordingly dismiss the application with costs.

Also found at [1985] 2 CLJ 396